(4)

Supreme Court, U.S.
FILED

AUG 22 2002

OFFICE OF THE CLERK

No. 02-34

IN THE

Supreme Court of the United States

Southwestern Illinois Development Authority,
Petitioner,

v.

National City Environmental, L.L.C.
and
St. Louis Auto Shredding Company,
Respondents.

On Petition for Writ of Certiorari
To the Supreme Court of Illinois

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

BRYAN CAVE LLP

Alan J. Dixon
Thomas C. Walsh
(Counsel of Record)
James F. Bennett
One Metropolitan Square #3600
St. Louis, MO 63102
(314) 259-2000
Attorneys for Petitioner

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

12 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT	2
I. This Court Has Jurisdiction of This Case.	3
II. SWIDA Retains Its Power of Eminent Domain, and the Decision Below Affects Not Just SWIDA but Every Public or Quasi-Public Body Possessing the Right of Condemnation	6
CONCLUSION	7

TABLE OF AUTHORITIES

Page

Cases

Arizona v. Evans, 514 U.S. 1 (1995) 6

Berman v. Parker, 348 U.S. 26 (1954) 1, 4,5

Blanchard v. Department of Transportation, 798 A.2d 1119 (Me. 2002) 2

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 1, 4, 5

Kentucky v. Stincer, 482 U.S. 730 (1987) 4

Michigan v. Long, 463 U.S. 1032 (1983) 3, 4

Minnesota v. National Tea Co., 309 U.S. 551 (1940) 6

New York v. Class, 475 U.S. 106 (1986) 5

Constitutional Provisions and Statutes

United States Constitution Amendment V 4

United States Constitution Amendment XIV ... 4

Illinois Constitution Art. I § 15 4

70 ILCS 520/8(b) 6

735 ILCS 5/7-103.70 6

Other Authorites

Gunnarsson, *Practice News*, 90 ILL. BAR. J. 282 (2002). 2

Kanner, *Developments in the Right-to-Take-Law*, SGO59 ALI-ABA 11 (American Law Institute 2002) 2

STERN, GRESSMAN, SHAPIRO & GELLER, SUPREME COURT PRACTICE, (8th ed. 2002) § 3.24, pp. 202-02 4

INTRODUCTION

Several aspects of Respondents' Brief in Opposition are significant and enlightening:

1. Respondents do not deny that the opinion of the Illinois Supreme Court is fairly characterized in petitioner's Question Presented.

2. Respondents make no effort to reconcile the challenged rulings below with controlling decisions of this Court or with any of the other contrary authorities cited in the petition. In particular, they do not — and cannot — show that the Illinois court's prohibition of private benefit resulting from the taking (Pet. 15-16), the requirement of free public access as of right (Pet. 16-18), or the *de novo* judicial review of the legislative determination (Pet. 18-20) are consistent with this Court's jurisprudence or the reasoned decisions of the other state supreme courts that have addressed the question presented.

Respondents attempt to distinguish *Berman v. Parker*, 348 U.S. 26 (1954), as a blighting case (Resp. Br. 22-23), ignoring the fact that the same rules have consistently been applied to takings for other public purposes. *See* Pet. 18-19. They also try to differentiate *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), on the ground that it dealt with a statewide scheme of private property reallocation (Resp. Br. 23-24). Respondents' description of *Midkiff* confirms that it was an enormously more pervasive transfer of private property to other private persons that survived a constitutional challenge because of its public purpose. In any event, respondents' perceived distinction in *Midkiff* is irrelevant to the issues raised here.

3. Respondents do not dispute that the decision below will be a leading player in the developing campaign to

adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 1040-41 (emphasis added).

The *Long* test reversed the traditional analysis and required that ambiguities in state court opinions be construed in favor of § 1257 jurisdiction, while still enabling the state court to have the final word in a given case by making such a "plain statement." *See generally* STERN, GRESSMAN, SHAPIRO & GELLER, SUPREME COURT PRACTICE (8th ed. 2002) § 3.24, pp. 202-07.

Long compels the conclusion that jurisdiction exists here. The Illinois Supreme Court stated at the outset of its analysis the general rule that private property cannot be taken for public use without just compensation. It then cited Art. I § 15 of the Illinois constitution and one of its decisions from 1994 (A-9). Immediately thereafter the Court referred to the Fifth Amendment to the United States Constitution, as made applicable to the states by the 14th, and cited this Court's opinion in *Midkiff* (A-10). One paragraph later, the court articulated the public use doctrine, this time citing the Fifth Amendment first and then the Illinois constitution (A-10). No other citations to constitutional provisions appear in the majority opinion.

The majority cited both federal and state cases, invoking *Midkiff* four times, *Berman* thrice, and three other cases from this Court. Nowhere is there a "plain statement" — or, for that matter, any statement — that the court intended to rest its decision on Illinois law. At the very least, the state and federal issues are "interwoven," and *Long* is therefore squarely controlling.

In *Kentucky v. Stincer*, 482 U.S. 730, 735-36 n. 7 (1987), almost the same fact pattern existed. The Court held that it had jurisdiction where the state court

referred to both state and federal constitutions and gave no indication that the respondent's rights under the state constitution were distinct from, or broader than, his federal constitutional rights. Likewise, *New York v. Class*, 475 U.S. 106, 109 (1986), is also directly on point. The Court there upheld jurisdiction where (a) the state high court mentioned the state constitution once, and then only in direct conjunction with the United States Constitution, (b) the state court's opinion made use of both federal and state cases in its analysis, and (c) the opinion lacked the requisite "plain statement" that it was based on state grounds.

Any doubt that the Illinois Supreme Court was engaged in federal constitutional law-making is swiftly and resoundingly dispelled by the dissenting opinion of Justice Freeman, which was joined by Justice McMorrow (A-18). He pointed out that the Illinois public use doctrine was derived from federal law, saying that "this court has, heretofore, been guided by the principles outlined in *Berman*" (A-33). He criticized the majority opinion as "not an accurate rendition of the holdings of *Hawaii Housing Authority* and *Berman* and of the principles of law involved in this area" (A-30). He accused the majority of engrafting requirements upon the Public Use Clause that were specifically rejected in those cases (A-29-30). He called the majority's treatment of those cases "alarming," and "disingenuous," and characterized the majority opinion as "seek[ing] to unravel the holdings of these opinions" (A-38-39).

Justice Freeman, as a member of the court who participated in the extended deliberations over this case (and who wrote the original majority opinion that was vacated on rehearing) (A-46), surely understood both what this case was about and the basis for the majority's ruling. And his dissent will unquestionably

be cited to demonstrate that this is a federal constitutional case.[3]

II. SWIDA Retains Its Power of Eminent Domain, and the Decision Below Affects Not Just SWIDA but Every Public or Quasi-Public Body Possessing the Right of Condemnation.

Respondents also maintain that the issues in this case are unlikely to recur because, according to the newspapers, SWIDA's "quick-take" power of eminent domain was not renewed by the Illinois General Assembly (Resp. Br. 26). Our answer is three-fold: (1) Even if the fast-track method of condemnation is not available under 735 ILCS 5/7-103.70, SWIDA still retains its regular power of eminent domain under 70 ILCS 520/8(b)(A-122), and its use of that power will be constrained by the very opinion now sought to be reviewed; (2) this case remains a live controversy between these parties; and (3) unless straightened out by this Court, the decision below will stand as a formidable impediment to economic redevelopment in each of the 50 states.

---

[3] Respondents suggest that the Illinois Supreme Court would likely reach the same result on remand under the state constitution (Resp. Br. 19). Such a potential eventuality poses neither a jurisdictional nor a prudential barrier to review by this Court. In *Arizona v. Evans*, 514 U.S. 1, 9 (1995), the Court quoted *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940), as follows:

> "It is fundamental that the state courts be left free and unfettered by us in interpreting their constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action."

CONCLUSION

For the reasons stated here and in the petition, certiorari should be granted.

Respectfully submitted,

BRYAN CAVE LLP
Alan J. Dixon
Thomas C. Walsh (Counsel of Record)
James F. Bennett
One Metropolitan Square #3600
St. Louis, MO 63102
(314) 259-2000
Attorneys for Petitioner

August 2002